(1) Supreme Court, U.S.

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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AIRMAN BASIC JOSE A. COSSIO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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May 2007

QUESTION PRESENTED

Whether the military judge erred in granting the petitioner's motion to dismiss based on the denial of his right to a speedy trial under Article 10, Uniform Code of Military Justice?

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The petitioner, Airman Basic Jose A. Cossio, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on January 10, 2007.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Cossio,* 64 M.J. 254 (C.A.A.F. 2007), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals, *United States v. Cossio*, Misc. Dkt. 2006-02, 2006 CCA LEXIS 128 (A.F. Ct. Crim. App. 10 May 2006) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on January 10, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867a(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 10, Uniform Code of Military Justice (UCMJ) Section 836(a) of Title 10, United States Code [hereinafter Article 10], provides:

> ...When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

STATEMENT OF THE CASE

This case presents the question of whether the military judge erred in granting the petitioner's motion to dismiss based on the denial of his right to a speedy trial under Article 10, UCMJ. The Air Force Court of Criminal Appeals reversed the military judge's ruling and the Court of Appeals for the Armed Forces affirmed the Court of Criminal Appeals' judgment.

1. Facts

a. Background

The petitioner's command, the Air Force Special Operations Command (HQ AFSOC),

charged him with one count of attempting to violate a lawful general regulation, one count of disrespecting a senior commissioned officer, one count of failure to obey a lawful order and two counts of conduct prejudicial to good order and discipline relating to his alleged maintenance of a false version of the official webpage for Hurlburt Field, Florida. Prior to arraignment, Appellant's trial defense counsel moved to dismiss all charges and specifications on the grounds that the government had violated Appellant's right to a speedy trial under Article 10, UCMJ. *See* App. Ex. III. On 2 February 2006, the military judge granted the motion and dismissed the charges and specifications with prejudice. *See* R. 464-93; App. Ex. XXIV. The government requested that the military judge reconsider the dismissal, but the military judge adhered to his previous ruling in a supplemental ruling. *See* R. 543-48; App. Ex. XXX.

b. First Court-Martial

On 16 December 2004, the petitioner was tried at a general court-martial for various violations of the UCMJ. *See* App. Ex. XXIV at 1. After the military judge found the petitioner guilty of a majority of the offenses, he sentenced the petitioner to a bad-conduct discharge, ten months of confinement, a fine of $750.00, and reduction in

grade from E-3 to E-1. *See id.* The petitioner left confinement and started appellate leave on 16 August 2005. *See id.* While on appellate leave, he lived at his parents' home in Berwin, IL. *See id.*

c. Alleged Article 89 Violation (Charge II)

During his confinement at Lackland Air Force Base, TX, in February or March 2005, the petitioner received the Staff Judge Advocate's Recommendation (SJAR) from his court-martial. *See id.* The petitioner allegedly responded to the SJAR by sending a letter to Maj WAD, an attorney assigned to HQ AFSOC/JA; the letter allegedly included disrespectful statements about Maj WAD. *See id.* Maj Tom Posch, the Deputy Staff Judge Advocate at 16 SOW/JA, testified that the government decided that the alleged conduct "wasn't serious enough to stand on its own at a trial by court-martial." R. at 303. In his findings of fact on the petitioner's Motion To Dismiss, the military judge found that this "matter was adequately investigated at the time and virtually no pretrial preparation would be required to resurrect this allegation." *See* App. Ex. XXIV at 1.

d. Alleged Article 92 Violation (Charge III)

On 24 February 2004, MSgt James D. Burns, the petitioner's First Sergeant, issued the petitioner a written order to "have no contact whatsoever with [A1C CEW]." I.O. Ex. 2. The order indicated that

it was "effective immediately and shall remain in effect until further notice"; it included e-mail in its definition of "contact." *Id.* A1C CEW received several e-mails from an individual claiming to be "Dave Brown" on 21-22 August 2005. *See* App. Ex. XXIV at 2. Apparently believing that the petitioner had sent the e-mails, she forwarded them to her First Sergeant, who forwarded them to 16 SOW/JA. *See id.* Over the next month, A1C CEW received additional e-mails from "Dave Brown" and e-mails that the petitioner allegedly sent under his given name. *See id.* The military judge found that:

> Given that the government had possession of the [e-mails] to [A1C CEW] sent by the so-called "Dave Brown" and [the petitioner] himself; and given they had evidence of the issuance and terms of the no-contact order; and given that [the petitioner] provided a statement to OSI on 6 October 2005 – where he admitted [e-mailing A1C CEW] both using his own name and the name "Dave Brown," where he admitted to telephoning her, where he explained the reason behind wanting to contact her...very little pretrial preparation

> would be required to try Charge III and its specification.

Id.

e. Alleged Article 80 and Article 134 Violations (Charge I and Charge IV)

On 27 September 2005, personnel assigned to 16 CS, which administers the Hurlburt Field unclassified e-mail and internet system, learned of a website that appeared to be an official Hurlburt Field website, but was not. *See id.* The counterfeit website prompted individuals to enter their official usernames and passwords. *See id.* 16 CS and AFOSI investigated the website that day, and discovered that e-mails related to the website had been sent to six individuals, including A1C CEW. *See id.* A "WHOIS" search determined that the counterfeit website was apparently registered to the petitioner; the address listed was his parents' home in Berwin, IL. *See id.* In his findings of fact, the military judge found that:

> The Comm Squadron's quick investigation into the matter; the fact that computer equipment was seized from [the petitioner's parents'] residence, which could arguably establish opportunity and knowledge

> – even without a DCFL forensic examination; and [the petitioner's] inculpatory statements to AFOSI on 6 October, suggest that an overwhelming amount of case preparation as to Charge I and its specification and Charge IV and its specifications – none of which are that dissimilar and all of which would seem to rely on much of the same proof – would not be required.

Id at 3.

f. Pretrial Confinement and Speedy Trial Request

After obtaining a search warrant from a federal magistrate, Air Force Office of Special Investigations (AFOSI) agents searched the petitioner's parents' residence on 5 October 2005. *See id.* Among other items, they seized five computer hard drives, 61 CDs, and 15 floppy diskettes. *See id.* The agents also apprehended the petitioner at that time; he was in military confinement until the 30 January-2 February 2006 motion hearing. *See id.*

Initially, the petitioner invoked his rights under Article 31, UCMJ. *See* I.O. Ex. 18 at 2. While waiting for a connecting flight in Atlanta, however, the petitioner allegedly initiated a discussion with

the AFOSI agents. *See id.* The agent's notes from this conversation indicate that the petitioner made statements about e-mailing A1C CEW and being involved with the fraudulent website. *See* App. Ex. 15, Atch. 13.

The government set the pretrial confinement hearing for 11 October. *See* App. Ex. XXIV at 4. Maj Judy L. King, the petitioner's sole defense counsel at the time, requested that the hearing be moved up to 7 October to accommodate her schedule. *See id.* at 4-5. 16 SOW did not comply with the request; ultimately, the pretrial confinement reviewing officer held the hearing on 13 October and determined that the petitioner should remain in pretrial confinement. *See id.* at 5. In his findings of fact, the military judge found that the government "should have" complied with Maj King's request to move the hearing to 7 October. On 28 October, the defense requested a speedy trial. *Id.*

g. Computer Evidence Processing

In mid-October, AFOSI sent the seized computer equipment for forensic examination at the Defense Computer Forensics Laboratory (DCFL). *See id.* at 3-4. The "imaging" process lasted from 20 October to 15 November; the forensic examination itself ran from 15 November to 12 January 2006. *See id.* at 4. DCFL sent out the

completed report on 17 January. In his findings of fact, the military judge concluded that DCFL "should have attached a higher priority to their examination of the materials" in the petitioner's case. *Id.* He focused on the fact that

> [w]hile Mr. [Armond] Carter [the sole forensic examiner working on the petitioner's case] was using his two workstations to analyze the material associated with this case, three other forensic examiners were working together on another matter, using six workstations. That matter had a high priority, too, but the government did not present any evidence that that examination was associated with a criminal investigation or that any defendant in that matter was in pretrial confinement.

Id. Mr. Carter testified at the motion hearing that the petitioner's case was a "Category 1" case, meaning that DCFL considered it "highest priority." R. at 200. During the reconsideration portion of the hearing, trial counsel indicated that a DCFL employee had characterized the other forensic matter as involving two networks and 22 systems. *See* R. at 511. Apparently, DCFL regarded the

other case as likewise being "Category 1," with "the highest priority over criminal cases because it was a national security case." *Id.*

The military judge also discussed the pace of Mr. Carter's analysis. He noted that Mr. Carter had

> ...completed his examination of the four Windows-based hard drives by 18 December, but the fifth hard drive, which was an [Apple iMac] hard drive, was more complicated and he was relatively unfamiliar with [Apple iMac] hard drives. Mr. Carter put his work on these hard drives aside, for the most part, from 12 to 23 December so he could attend a training course offered in his building. He did not work on [the petitioner's] materials during the two weeks of his training course, although he did put in 10 hours of work on the materials during the weekend of 17-18 December. Before being assigned the materials seized in this case, Mr. Carter and his supervisor discussed whether someone else should do the examination – someone already more familiar with the [Apple iMac] hard

> drive who was not attending the training course. Mr. Carter really wanted to do the analysis; he thought it would be challenging and a good learning experience.

App. Ex. XXIV at 4.

h. Pre-Referral Trial Processing

On 26 October 2005, Capt J. Kris White, an attorney assigned to 16 SOW/JA, forwarded draft charges and a proof analysis, notes, and legal research to Maj Mary M. Spangler, the Chief of Military Justice at AFSOC/JA. *See id.* at 5. Maj Spangler completed her review on 10 November. *See id.* at 6. She recommended "minor changes" to the wording of three of the charges, but otherwise indicated that she had no other suggested charges, that no proof issues existed with any of the charges, and that no further evidence was needed. *Id.* The military judge noted that "HQ AFSOC/JA [was], by 10 November 2005, apparently completely satisfied with the way this case has been charged." *Id.* Nevertheless, Maj Spangler indicated in her e-mail that she would need to review the charge sheet in its entirety before preferral. *See id.*

Capt White e-mailed Maj King on 2 November and indicated that "AFOSI is currently in the process of completing their investigation and analysis of the computer seized from [the petitioner's parents']

residence. Once that analysis is complete, additional charges may be preferred, depending on the evidence that it obtained." *Id.* The focus on the DCFL analysis as a path to additional charges appears to have been common among the 16 SOW/JA attorneys who worked on the case. Of four 16 SOW/JA attorneys who testified at the motion hearing, three expressed this mindset. *See* R. 84-85, 257-58, 316, 361. Maj Posch also indicated that the government had been concerned about the petitioner's speedy trial clock and discovery rights under *Brady v. Maryland*, 373 U.S. 83 (1963). *See* R. at 339.

It appears that the government regarded the charges as ready for preferral on 17 November, but delayed preferral until 22 November because the petitioner's commander was temporarily assigned to another duty location. *See* App. Ex. XXIV at 6-7. On 29 November, 16 SOW/CC appointed Maj Andrew T. Krog, an attorney assigned to AFSOC/JA, as Article 32 Investigating Officer; the defense learned of the appointment on 1 December. *See id.* at 7.

That same day, Maj Krog notified the parties that he intended to set a hearing date for the next week. *See id.* He clarified this to mean 6 December. *See id.* All parties agreed. *See id.* On 5 December, Maj King requested that the hearing be

delayed until 13 December; she indicated that she would be available on 14 December, as well. *See id.* Maj Krog granted the delay. *See id.* Ultimately, the Article 32 hearing began on 14 December. *See id.*

Maj Krog submitted his report to 16 SOW/JA on 22 December. *See id.* On all charges and specifications, he concluded that the evidence presented was "sufficient." *See* I.O. Report. He made no comments expressing a need for additional evidence. *See id.* Col Von Wald, HQ AFSOC Staff Judge Advocate, signed the pretrial advice on 29 December, and Lt Gen Michael W. Wooley, the general court-martial convening authority, referred all charges and specifications to trial on 30 December. *See* App. Ex. XXIV at 7.

i. Post-Referral Trial Processing

The petitioner received a copy of the Article 32 report on 29 December, but Maj King did not receive a copy until 3 January. *See id.* at 8. The government served the petitioner with a copy of the referred charges on 5 January. *See id.*

On 3 January, Col Thomas Cumbie, the Chief Judge of the Eastern Circuit, met with Capt Dana Holmquist from 16 SOW/JA and Maj King to address docketing for another case. *See id.* They also discussed the trial date for the petitioner's case. *See id.* Both the government and defense provided

Col Cumbie with memoranda dated 3 January. *See id.* The government memorandum, signed by Capt Sandell, asserted that the "government requests that this case be docketed for 30 Jan 06." *See id.* Maj King's memorandum noted that the petitioner had made a speedy trial demand on 28 October, that the petitioner had been placed in pretrial confinement on 5 October, and that her schedule was open through 14 January. *See id.* She indicated that she had a "board" 15-19 January, but did not specify what kind of a board it was. *See id.*

Col Cumbie "directed" a 30 January trial date in his 6 January docketing memorandum. *See id.* As the military judge observed in his findings of fact, this meant that the "parties could not agree upon a trial date, so the Chief Judge had to pick one himself." *See id.* Col Cumbie's memorandum indicated that the "Next Available Judge Date" was 23 January. *See id.* at 8-9. The military judge noted that this meant that no "Eastern Circuit military judges [were] available to try the case until 23 January." *Id.* at 9. He found that "the government presented no evidence" on whether Col Cumbie had looked outside the Eastern Circuit for a military judge. *Id.*

At the time of docketing, three courts-martial were scheduled for the Hurlburt Field courtroom in

January: *United States v. Beres*, *United States v. Lindo* and *United States v. Schrier*. *See id.* at 9-10. In his findings of fact, the military judge indicated that *United States v. Schrier* was the only case of the three that involved pretrial confinement, but that the pretrial confinement had started almost two months later than the petitioner's confinement. *See id.* Moreover, none of the cases had involved speedy trial requests or statute of limitations concerns. *See id.* During the motion hearing, Col Cumbie testified that he did not look for alternate sites for earlier in January because of Maj King's schedule, and that he did not reschedule any of the cases previously docketed for the Hurlburt Field courtroom because he thought that everyone agreed with the 30 January trial date. *See* R. at 523. The military judge made findings of fact that

> [i]n the docketing conferences held with the parties, the government affirmatively did not ask Col Cumbie to reschedule US v. Beres, US v. Lindo or US v. Schrier to accommodate an early trial date in [the petitioner's case]. In only one of those three cases was the accused in pretrial confinement, and that was for a relatively short period of time; in none was there a request for a

> speedy trial; and US v. Lindo went Chapter 4 at the last minute. The government could have asked Col Cumbie to move up [the petitioner] into Lindo's slot, or asked that [the petitioner] be moved up to 26 January. Or, Col Cumbie could have done this sua sponte, given the length pretrial confinement and the demand for the speedy trial in [the petitioner's case]. But, this did not take place.

App. Ex. XXIV at 10.

j. Article 10 Motion: Military Judge's Findings

The relevant case law required the military judge to make four factual findings: length of delay, reasons for delay, whether the petitioner had made a speedy trial request, and prejudice.

(1) Length of Delay

The military judge regarded 6 October 2005, the day after the government placed the petitioner into pretrial confinement, as "Day 1." *See* App. Ex. XXIV at 12. Overall, he calculated that the government was chargeable with 109 days under the Article 10 speedy trial clock. *See id.* at 13. He reached this figure by charging 6-13 December to

the defense for its role in delaying the Article 32 hearing and charging all other days from 6 October 2005-30 January 2006 to the government. *See id.* at 12-13.

(2) Reasons for Delay

The military judge reviewed the stages of pretrial preparation and found "unreasonable" reasons for delay on several occasions:

- The government's taking 14 days to perform its initial pre-preferral review
- The government's letting 12 days elapse between the pre-preferral review and preferral, despite the fact that AFSOC/JA had concluded that "there were no other suggested charges, no proof issues, and no further evidence needed".
- The seven-day delay before Maj Krog was appointed IO
- The two days before the defense learned of Maj Krog's appointment
- Maj Krog's setting the Article 32 hearing for a week after his appointment, rather than immediately

- The government's not serving the petitioner with charges until six days after referral
- The government and judiciary's failure to docket the case expeditiously

See id. at 13-14. Overall, the military judge found 64 days of unreasonable delay. *See id.*; App. Ex. XXV. He discussed the delay in docketing the case fairly extensively.[1] He noted that "the defense was readily available, at least for motion practice, from 6 January through 14 January, based on Maj King's 3 Jan 06 memo to Col Cumbie" and that the "board the next week, as it was not a UCMJ action, was secondary to this court-martial, and Maj King could have been made available for [Appellant's case] then." *Id.* at 13. He subsequently found fault with the government and judiciary *Id.* The military judge dismissed the notion that lag in getting the forensic results from DCFL was a reason for delay. As noted above, he concluded that the government had most of its evidence necessary to go to trial by

[1] The military judge included this discussion in evaluating the length of the delay, but it is more appropriately considered in the "reasons for delay" analysis.

early October 2005 – over three months before DCFL returned its findings.

(3) Speedy Trial Request

The military judge noted that the petitioner had requested a speedy trial on 28 October 2005. *See id.* at 14. He observed that "on many occasions Maj King tried to speed the process along," which indicated that the petitioner "actually desired a speedy trial, unlike the situation in [*Barker v. Wingo*, 407 U.S. 514 (1972)] where the defendant, for tactical reasons or otherwise, did not." *Id.*

(4) Prejudice

The military judge concluded that "there is no prejudice in this case beyond that inherent in sitting in pretrial confinement for 109 days." *Id.*

For his ultimate conclusion of law, the military judge ruled that

> ...under the circumstances of this case, given the lengthy pretrial confinement, the demand for speedy trial, the unrealistic hope that DCFL would complete its forensic analysis in a relatively short period of time, the unwillingness to ask the docketing judge to docket this case before 30 January, and the

> Judiciary's failure to give this case a higher priority, the periods of delay in this case show that the government negligently failed to exercise reasonable diligence.

Id. at 15.

2. Proceedings Below

Concluding that the reason for the delay was "extensive investigation which had to be undertaken before [the petitioner] could be competently tried," the Air Force Court of Criminal Appeals ruled that the government had not denied the petitioner's right to a speedy trial. Consequently, it granted the government's appeal under Article 62, UCMJ and set aside the military judge's ruling. The Court of Appeals for the Armed Forces affirmed the Court of Criminal Appeals' ruling.

REASONS FOR GRANTING THE WRIT

The military judge correctly granted the petitioner's motion to dismiss all charges and specifications as a remedy for the government's denial of the petitioner's right to a speedy trial under Article 10, UCMJ. The government threw the petitioner into pretrial confinement and formulated charges against him, but lollygagged on bringing him to trial in hopes that the forensic

analysis of computer equipment seized from his parents' home would allow it to pile on further charges. In light of Appellant's prompt request for a speedy trial, the government's approach cannot be regarded as "reasonable diligence."

Article 10, UCMJ, requires that, "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, *immediate* steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." (emphasis added). In *United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993), the predecessor to the Court of Appeals for the Armed Forces held that:

> [w]e happen to think that 3 months is a long time to languish in a brig awaiting an opportunity to confront one's accusers, and we think Congress thought so too. Four months is even longer. We see nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90- or 120-days is involved. At the same time, we recognize that there are many circumstances that justify even longer periods of delay. However, where it is established that the

> Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to, we think an Article 10 motion would lie.

Citing *United States v. Tibbs*, 35 C.M.R 322, 325 (C.M.A. 1965), the *Kossman* court ruled:

> It suffices to note that the touchstone for measurement of compliance with the provisions of the UCMJ is not constant motion, but *reasonable diligence in bringing the charges to trial.* Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive.

Kossman, 38 M.J. at 262 (emphasis added). In determining whether the facts of a given case constitute "reasonable diligence" under Article 10, the Court has asserted that the four factors relevant to a Sixth Amendment speedy trial analysis – length of delay, reasons for delay, whether the accused requested a speedy trial, and prejudice to the accused – are an "apt structure" for the analysis. *Mizgala*, 61 M.J. at 127-29 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

In *Barker*, this Court offered guidelines for analyzing the speedy trial factors. This Court noted

that whether a delay of a given length of time is inappropriate is "necessarily dependent upon the peculiar circumstances of the case." *Barker*, 407 U.S. at 530-31. As an example, this Court indicated that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531.

When evaluating the "reason the government assigns to justify the delay," this Court opined that "different weights should be given to different reasons." Specifically, a

> ...deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government, rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. This Court noted that the "defendant's assertion of his speedy trial right...is entitled to strong evidentiary weight in determining whether the

defendant is being deprived of that right." *Id.* at 531-32. Finally, this Court identified three interests leading to prejudice to a defendant, including "to prevent oppressive pretrial incarceration." *Id.* at 532. In describing the reasons that it regarded pretrial incarceration as prejudice, this Court indicated

> [w]e have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.

Id. at 532-33. This Court concluded that it regarded "none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial"; consequently, the courts "must still engage in a difficult and sensitive balancing process. *Id.* at 533.

The military judge's ruling consisted of two parts: his findings of fact on the four *Barker* factors and his conclusion of law that the factors required dismissal. His findings of fact must be affirmed unless they are "clearly erroneous"; his conclusion of law is reviewed de novo. *See Mizgala*, 61 M.J. at 127 (citing *United States v. Cooper*, 58 M.J. 54, 57-59 (C.A.A.F. 2003) and *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)). In the petitioner's case, these standards demand the military judge's ruling be affirmed.

1. Findings of Fact on the *Barker* factors

The factual existence of the "speedy trial request" factor is uncontroverted; it is clear that the petitioner did request a speedy trial, on 28 October 2005. The "length of delay" factor is likewise unassailable: the petitioner went into pretrial confinement on 5 October 2005 and was arraigned on 30 January 2006. Consequently, any factual dispute is limited to the findings on the "reasons for delay" and "prejudice" factors.

The military judge found a variety of reasons why the petitioner's arraignment took place on 30 January 2006, rather than on some earlier date. He found delay in preferring the charges, holding the Article 32 hearing, serving the petitioner with the charges, and docketing the case. Concluding that the government had enough evidence without the

forensic results to prosecute the charged offenses, he dismissed the possibility that the length of time for DCFL to return its findings was the reason for delay. On the prejudice factor, he found that "there is no prejudice in this case beyond that inherent in sitting in pretrial confinement for 109 days." For an appellate court to overturn either of those findings, it must conclude that the military judge was "clearly erroneous."

The military judge's findings on the "reason for delay" factor were correct – not erroneous. That the pre-preferral review, Article 32 investigation and service of charges happened according to the chronologies expressed in the military judge's findings of fact is indisputable. Similarly, that the government and judiciary declined to alter the docket or search for another military judge is also clearly established. The military judge's finding that the DCFL results were inessential to proving the charged offenses – and, as such, not the "reason for the delay" – is supported by their absence from the pre-preferral review and Article 32 report. Consequently, the military judge's ruling on the "reasons for the delay" cannot be considered "clearly erroneous."

On the prejudice factor, the military judge found that "there is no prejudice in this case beyond that inherent in sitting in pretrial confinement for 109

days." It is worth noting that this Court's opinion in *Barker* appears to regard pretrial confinement as prejudice *per se*. When this Court drafted that opinion, it intended it to be applied to defendants awaiting trial free from confinement, along with defendants confined before trial. This Court described time spent in jail awaiting trial as "dead time" that "has a detrimental effect on an individual." In this context, the military judge's ruling that the petitioner did suffer prejudice should also survive the "clearly erroneous" test.

2. Conclusions of Law

The military judge correctly ruled that the government violated the petitioner's Article 10 rights. The government threw the petitioner into pretrial confinement and formulated charges against him, but dawdled on bringing him to trial in hopes that a forensic review of computer equipment seized from his parents' home would allow it to pile on further charges. In light of the petitioner's prompt request for a speedy trial, the government's approach cannot be regarded as "reasonable diligence."

The petitioner demanded a speedy trial fairly early in his period of pretrial confinement, but was not arraigned until after almost four months of confinement. In determining whether the length of delay supports a finding of a speedy trial violation,

this Court's opinion in *Barker* cited the complexity of the charges as a significant factor; the less complex the charges are, the shorter the delay that can be accepted. The military judge's findings and prosecution's paper trail indicate that the referred charges were essentially investigated and ready for trial well before the arraignment date. It follows that a reasonably diligent prosecution would have brought the petitioner to trial considerably sooner.

With relatively uncomplex charges, an almost four-month-long delay, the prejudice of pretrial confinement, and a speedy trial request, it is possible that a valid reason for delaying the petitioner's court-martial could have saved the government from an Article 10 violation. The record does not provide such a reason. Prior to referral, prosecution negligence – especially taking so many days to complete the pre-preferral review and set up the Article 32 hearing – caused the delays. The post-referral delay was essentially the product of overcrowding of the courts. Both are factors that the *Barker* court indicated "should be considered [in a speedy trial analysis] since the ultimate responsibility for such circumstances must rest with the government, rather than with the defendant."

Even if this Court were to accept the Court of Criminal Appeals' preferred reason for the delay, the need to complete the computer analysis, the balancing analysis supports the conclusion that the government violated the petitioner's Article 10 rights. The government and its forensic laboratories are not entitled to take an indefinite amount of time to investigate "all possible sources of information before undertaking a prosecution," especially when an Airman is in pretrial confinement and has requested a speedy trial. The paper trail and testimony of the government's attorneys underscored the unreasonableness of this reason: the government looked to the DCFL results with an eye on adding additional charges, rather than bolstering the existing charges.

Concededly, the government's reasons for delay – either as found by the military judge or as perceived by the Court of Criminal Appeals – might have been sufficient to tip *Barker*'s balancing test in its favor if the petitioner had not been in pretrial confinement, or if he had not made a speedy trial demand. In this context, however, the reasons were inadequate. The government violated the petitioner's right to be brought to trial with "reasonable diligence." Dismissal of all charges and specifications with prejudice was the appropriate remedy.

CONCLUSION

The military judge correctly granted the petitioner's motion to dismiss all charges and specifications as a remedy for the government's denial of the petitioner's right to a speedy trial under Article 10, UCMJ. The petitioner therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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May 2007

Appendix A

UNITED STATES, Appellee

v.

JOSE A. COSSIO,
Airman Basic U.S. Air Force,
Appellant

64 M.J. 254

United States Court of Appeals for the Armed Forces

Argued October 24, 2006
Decided January 10, 2007

ERDMANN, J., delivered the opinion of the court, in which EFFRON, C.J., and BAKER, J., joined.

STUCKY and RYAN, JJ., did not participate.

Counsel

For Appellant: Captain John S. Fredland (argued); Lieutenant Colonel Mark R. Strickland.

For Appellee: Captain Captain Donna S. Ruppell (argued); Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs and Major Kimani R. Eason.

Military Judge: William A Kurlander Jr.

Judge ERDMANN delivered the opinion of the Court.

Airman Basic Jose A. Cossio was charged with attempting to violate a lawful general regulation, disrespect toward a superior commissioned officer, willful disobedience of a lawful order, wrongfully creating and maintaining a false official web page which solicited computer identifications, and wrongfully pretending to be an employee acting under the authority of the United States Air Force in violation of Articles 80, 89, 92, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880,

889, 892, 934 (2000). Prior to trial the military judge granted Cossio's motion to dismiss all charges with prejudice based on the denial of Cossio's speedy trial rights under Article 10, UCMJ, 10 U.S.C. § 810 (2000).

The Government appealed this ruling pursuant to Article 62, UCMJ, 10 U.S.C. § 862 (2000). The United States Air Force Court of Criminal Appeals granted the Government's appeal and set aside the military judge's dismissal. *United States v. Cossio*, Misc. Dkt. 2006-02, 2006 CCA LEXIS 128, 2006 WL 1540671 (A.F. Ct. Crim. App. May 10, 2006). We granted Cossio's petition to determine whether he had been denied his Article 10, UCMJ, right to a speedy trial.[1]

Article 10, UCMJ, ensures a servicemember's right to a speedy trial by providing that upon "arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges

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[1] WHETHER THE MILITARY JUDGE ERRED IN GRANTING APPELLANT'S MOTION TO DISMISS BASED ON A DENIAL OF HIS RIGHT TO A SPEEDY TRIAL UNDER ARTICLE 10, UCMJ. 64 M.J. ___ (C.A.A.F. 2006).

and release him." Cossio claims that, in light of his demand for a speedy trial and the Government's lack of due diligence in bringing him to trial after he was confined, the military judge correctly ruled that he had been denied his Article 10, UCMJ, right to a speedy trial. He asks that we set aside the decision of the Court of Criminal Appeals, which would have the effect of reinstating the military judge's dismissal of the charges and specifications with prejudice. We conclude as a matter of law that the Government exercised reasonable diligence in bringing the charges to trial and that Cossio was not denied his right to a speedy trial under Article 10, UCMJ.

Background

Prior to the charges which were the basis of this appeal, Cossio was convicted at a general court-martial on unrelated charges and sentenced to a bad-conduct discharge, confinement for ten months, a fine, and reduction to airman basic. Cossio was placed on appellate leave after he was released from confinement on the earlier charges. While on appellate leave and as a result of an investigation into a counterfeit website

purporting to be an official Hurlburt Field[2] website, Cossio was apprehended and placed into confinement on October 5, 2005. A pretrial confinement hearing was held on October 13, 2005, and the pretrial confinement hearing officer directed that Cossio remain in confinement.

Computer equipment seized from Cossio was sent to the Defense Computer Forensics Laboratory (DCFL) for analysis on October 18, 2005. The DCFL conducted analysis of the equipment including "imaging" the hard drives and forensically examining the computer equipment. This analysis began on October 20, 2005, and lasted until January 12, 2006. DCFL completed and dispatched its computer forensic report on January 17, 2006. The Air Force Office of Special Investigations (AFOSI) completed its report on January 25, 2006.

In the interim, draft charges were prepared and forwarded to the Air Force Special

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[2] Hurlburt Field is a U.S. Air Force Base located on the gulf coast of Florida and is home to the U.S.A.F. Special Operations Command. See Hurlburt Field, http://www2.hurlburt.af.mil (last visited Jan. 10, 2007) (official Hurlburt Field website).

Operations Command (AFSOC) judge advocate's office for review on October 26, 2005. On October 28, Cossio made a demand for a speedy trial. The AFSOC judge advocate's office completed its review of the draft charges on November 10, 2005, and charges were preferred against Cossio on November 22. The Article 32, UCMJ, 10 U.S.C. § 832 (2000), investigating officer was appointed on November 29, 2005. After a defense-requested delay from December 5 through 13, 2005, the Article 32, UCMJ, investigation was conducted on December 14 and the report of investigation submitted on December 22. Charges were referred to trial on December 30, 2005.

On January 3, 2006, the military judge held a Rule for Courts-Martial (R.C.M.) 802 conference at which trial was set for January 30. Because the parties could not agree on that particular trial date, the chief circuit military judge "directed" trial to begin on that date. Cossio remained in continuous pretrial confinement for a total of 120 days until the military judge dismissed the charges on February 2, 2006.

Discussion

Because this case came to the Court of Criminal Appeals by way of a Government

appeal under Article 62, UCMJ, that court was limited to reviewing the military judge's decision only with respect to matters of law. Article 62, UCMJ; R.C.M. 908(c)(2). The court was bound by the military judge's findings of fact unless they were clearly erroneous and that court could not find its own facts or substitute its own interpretation of the facts. *See United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). This court reviews de novo the question of whether Cossio was denied his right to a speedy trial under Article 10, UCMJ, as a matter of law and we are similarly bound by the facts as found by the military judge unless those facts are clearly erroneous. *Id.*; *United States v. Cooper*, 58 M.J. 54, 58-59 (C.A.A.F. 2003).

In reviewing claims of a denial of a speedy trial under Article 10, UCMJ, we do not demand "'constant motion, but reasonable diligence in bringing the charges to trial.'" *Mizgala*, 61 M.J. at 127 (quoting *United States v. Tibbs*, 15 C.M.A. 350, 353, 35 C.M.R. 322, 325 (1965)); *see also United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). We inquire whether the Government moved toward trial with "reasonable diligence." *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999). Brief inactivity is not fatal to an otherwise active,

diligent prosecution. *Tibbs*, 15 C.M.A. at 353, 35 C.M.R. at 325 (citing *United States v. Williams*, 12 C.M.A. 81, 83, 30 C.M.R. 81, 83 (1961)).

Although Article 10, UCMJ, creates a more stringent speedy trial standard than the Sixth Amendment, we have determined that "the factors from *Barker v. Wingo*, 407 U.S. 514 (1972), are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation." *Mizgala*, 61 M.J. at 127 (citing *Cooper*, 58 M.J. at 61); *Birge*, 52 M.J. at 212. Those factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *Mizgala*, 61 M.J. at 129 (citing *Barker*, 407 U.S. at 530).

Cossio argues that in light of his demand for a speedy trial, the Government's approach to his case cannot be considered reasonable. He attributes delay to Government "lollygag[ing]" in hope of securing additional charges. Cossio claims that the Court of Criminal Appeals did not adhere to the military judge's findings of fact which were not clearly erroneous and thus were binding on that court. He claims that the Court of Criminal Appeals erroneously applied a less deferential "common sense and

knowledge of the ways of the world" standard, thereby substituting its own perceptions for the military judge's binding factual findings.

The Government responds that the military judge erred in his assessment of whether the charges proceeded to trial with reasonable diligence. According to the Government, the collection and processing of evidence, in particular the need for forensic evaluation of the computer evidence, was prioritized appropriately and not unreasonable. The Government urges that the Court of Criminal Appeals applied the proper clearly erroneous standard to the facts as found by the military judge.

We have reviewed the record and the military judge's thorough findings of fact and conclusions of law. His analysis reflects great attention to the just resolution of the motion before him. He is to be commended for his diligence in resolving the motion and his concern for Cossio's right to a speedy trial. His findings that are factual in nature are amply supported by the record and thus not clearly erroneous. Nonetheless, we conclude that, as a matter of law, the facts as found by the military judge do not reflect an absence of due diligence

constituting a denial of Cossio's Article 10, UCMJ, right to a speedy trial.

Initially we are confronted with a dispute between Cossio and the Government concerning precisely what the military judge found as fact, and thus binding, versus conclusionary or interpretative statements. Military judges must be careful to restrict findings of fact to things, events, deeds or circumstances that "actually exist" as distinguished from "legal effect, consequence, or interpretation." *Black's Law Dictionary* 628 (8th ed. 2004) (defining "fact"). We agree with the Court of Criminal Appeals that the military judge mixed findings of fact with "criticism", "apparent belief" and "opinions." *Cossio*, slip op. at 5, 2006 CCA LEXIS 128, at *8-*9, 2006 WL 1540671, at *3. We therefore accept the military judge's findings of fact insofar as they establish the events and circumstances leading to Cossio's trial and proceed to review de novo whether those facts demonstrate a lack of reasonable diligence under Article 10, UCMJ.

Length of Delay

The first factor under the *Barker* analysis is the 'length of the delay' which "'is to some extent a triggering mechanism,' and unless there is a period of delay that appears, on its face, to

be unreasonable under the circumstances, 'there is no necessity for inquiry into the other factors that go into the balance.'" *United States v. Smith*, 94 F.3d 204, 208-09 (6th Cir. 1996) (quoting *Barker*, 407 U.S. at 530). Under the circumstances of this case -- where the accused had made a timely demand for a speedy trial and had been in continuous pretrial confinement for 117 days when he moved for relief -- the length of delay is sufficient to trigger the full Barker inquiry.

Reasons for the Delay

The Government notes it was necessary to await forensic examination of the computer equipment to assess the nature of the evidence against Cossio and the true extent of his criminal conduct. Cossio counters that once he had confessed, the Government had all the evidence necessary to proceed to trial. We conclude that it was not unreasonable for the Government to marshal and weigh all evidence, including forensic evidence, before proceeding to trial. *See* R.C.M. 601(e)(2) Discussion ("Ordinarily all known charges should be referred to a single court-martial.").

Forensic examination of the computer equipment seized from Cossio may have provided critical evidence bearing directly on

whether the Government could sustain its burden of proof. In addition, the record reflects that the DCFL devoted itself to another high priority case at the same time Cossio's computer equipment was analyzed. While delay awaiting forensic evidence may be unreasonable in another case, nothing in this case suggests that DCFL improperly prioritized the other case being analyzed at the same time or otherwise unreasonably delayed forensic examination of the computer evidence in Cossio's case.

Although the technical processing of charges against Cossio did involve some delay, on balance the reason for the delay in this case weighs in favor of the Government.

Speedy Trial Request

Cossio made a demand for a speedy trial twenty three days after he was apprehended. Thus, this factor weighs in Cossio's favor.

Prejudice

As we noted in *Mizgala*, the Supreme Court has established the following test for prejudice in the speedy trial context:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the

> speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532 (footnote omitted), quoted in *Mizgala*, 61 M.J. at 129.

Cossio has failed to assert or establish prejudice under the *Barker* prejudice criteria. The military judge found:

> Although there was pretrial confinement in this case, there has been no evidence that AB Cossio's "anxiety and concern" has exceeded the norm. There's been no showing that he wasn't paid, after an early finance glitch that was remedied. There's been no showing that the conditions of

> his pretrial confinement have been unduly harsh. There's been no showing that his defense has been impaired by the passage of time. Lastly, upon conviction, he would be entitled to receive administrative credit upon any sentence to confinement for the days he spent in pretrial confinement. Therefore, there is no prejudice in this case beyond that inherent in sitting in pretrial confinement . . . .

The Court of Criminal Appeals also concluded that there was no prejudice and we agree. The record clearly fails to establish that Cossio suffered any *Barker* prejudice.

Balancing of Barker Factors in an Article 10 Context

Considering the fundamental command of Article 10, UCMJ, for reasonable diligence and balancing the Barker factors, we conclude that Cossio was not denied his right to a speedy trial under Article 10, UCMJ. Even though the technical processing of the charges was not exemplary, the Government has the right (if not the obligation) to thoroughly investigate a case before proceeding to trial. Here, the record does

not demonstrate that DCFL improperly prioritized or otherwise unreasonably delayed the forensic examination of the computer evidence, and there was no particularized prejudice. The Government actually leaned forward by getting a trial date before it had the completed DCFL analysis or AFOSI report of investigation. We conclude that the Government proceeded to trial with reasonable diligence under the circumstances of this case and the Court of Criminal Appeals did not err in deciding that Cossio was not denied his Article 10, UCMJ, right to a speedy trial.

Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JOSE A. COSSIO

United States Air Force

Misc. Dkt. 2006-02

10 May 2006

GCM convened at Hurlburt Field, Florida on 30 January 2006. Military Judge: William A. Kurlander.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs and Major Kimani R. Eason.

Appellate Counsel for Appellee: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland and Captain John S. Fredland.

Before

BROWN, MOODY, and FINCHER

Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

On 22 November 2005, the Commander of the 16th Mission Support Squadron, Air Force Special Operations Command (AFSOC) at Hurlburt Field, Florida, preferred charges on the accused, Airman Basic (AB) Jose Cossio. These charges were one specification of attempted violation of a lawful general regulation, one specification of disrespect toward a commissioned officer, one specification of violation of a lawful order, wrongfully soliciting identification and password information by means of a false Hurlburt Field Webpage, and one specification of violating 18 U.S.C. § 912, by pretending to be an employee acting under the authority of a department of the United

States in soliciting identification and password information, in violation of Articles 80, 89, 92, and 134, UCMJ, 10 U.S.C. §§ 880, 889, 892, 934. The charges were referred to trial by general court-martial on 30 December 2005 and AB Cossio was arraigned on 30 January 2006.

Prior to entering pleas, AB Cossio, through counsel, moved for dismissal of the charges and specifications due to an alleged violation of his right to a speedy trial under Article 10, UCMJ, 10 U.S.C. § 810. The military judge granted the motion on 3 February 2006, dismissing the charges and specifications with prejudice. The government has appealed this dismissal under Article 62, UCMJ, 10 U.S.C. § 862. We have considered the government's brief in support of this appeal and AB Cossio's answer thereto. For the reasons set forth below, we set aside the military judge's decision and remand the case to the trial court for further proceedings.

Background

This case arose following the discovery that AB Cossio had established a website which looked remarkably similar to the one maintained by Hurlburt Field, Florida. This false website solicited members to provide their user name and password. At the time the website was

established, AB Cossio was living in Illinois on appellate leave, having been previously convicted of wrongfully accessing the private financial records of Air Force personnel. He did this through a Defense Finance and Accounting System website, causing another member's pay to be routed to a charity selected by AB Cossio.

In granting AB Cossio's speedy trial motion, the military judge made extensive findings of fact. Because these findings- comprise approximately 20 pages of transcript, we will identify and summarize what we consider to be the most significant for purposes of this appeal.

- On 27 September 2005, personnel assigned to the 16th Communications Squadron, Hurlburt Field, learned of a website that mimicked Hurlburt's official site.

- On 5 October 2005, the AFOSI and local law enforcement officials searched AB Cossio's residence in Illinois, seized five computer hard drives, among other things, and placed AB Cossio under apprehension.

• On 6 October 2005, AB Cossio was transported from Illinois to Hurlburt Field and placed in pretrial confinement.

• On 11 October 2005, the pretrial confinement hearing took place. (Although not contained in the judge's findings of fact, on 14 October 2005 the Pretrial Confinement Reviewing Officer continued AB Cossio in pretrial confinement).

• Around 15 October 2005, the AFOSI sent the hard drives to Defense Computer Forensics Laboratory (DCFL) for forensic analysis.

• On 26 October 2005, Captain W of the 16th Special Operations Wing legal office (16 SOW/JA) sent relevant statutes and documents to the AFSOC legal office (AFSOC/JA) for a "pre-preferral review."

• On 28 October 2005, AB Cossio, through counsel, made a demand for speedy trial.

- From 20 October to 15 November 2005, an analyst at DCFL conducted the "imaging" of the hard drives, copying them so that they could be analyzed.
- On 10 November 2005, AFSOC/JA completed its "pre-preferral review."
- From 15 November 2005 to 12 January 2006, the DCFL analyst conducted the actual forensic examination of the hard drives, although he attended a training course from 12 to 23 December 2005.
- On 22 November 2005, AB Cossio's commander preferred charges.
- Around 22 November 2005, the AFSOC/JA advised the trial counsel assigned to AB Cossio's case that another case, *United States v. Beres*, was to be his top priority.

• On 23 November 2005, the Commander of 16 SOW (16 SOW/CC) appointed a Major (Maj) A to be the investigating officer (IO) for the Article 32, UCMJ, 10 U.S.C. § 832, investigation in AB Cossio's case.

• On 29 November 2005, the 16 SOW/CC appointed a different IO, Maj K, in view of his knowledge of computers.

• On 1 December 2005, Maj K set the date of the Article 32, UCMJ, investigation for 6 December 2005.

• On 5 December 2005, AB Cossio, through counsel, requested a delay until the afternoon of 13 December 2005.

• On 14 December 2005, Maj K conducted the Article 32, UCMJ, investigation.

• On 22 December 2005, Maj K submitted his written report of

the
investigation to the 16 SOW/JA.

- On 3 January 2006, representatives of the government, along with the defense counsel, attended a docketing conference with the Chief Circuit Military Judge (CCMJ) of the Eastern Judicial Circuit. At this conference, the government asked for a 30 January 2006 trial date, due in part to Hurlburt Field having three intervening courts scheduled for dates earlier in January.

- On 6 January 2006, the CCMJ directed that AB Cossio's trial begin on 30 January.

- In 2005, Hurlburt Field tried the highest number of general courts-martials in the Air Force.

- On 25 January 2006, the AFOSI completed its report of investigation in AB Cossio's case.

• On 30 January 2006, trial began and AB Cossio was arraigned.

Discussion

The United States may appeal "an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification." Article 62(a)(1)(A), UCMJ. The military judge granted the defense's motion to dismiss the charges and specification with prejudice, finding a violation of AB Cossio's Article 10, UCMJ, rights. The military judge's ruling meets the jurisdictional requirements of Article 62, UCMJ.

This Court reviews a military judge's rulings on speedy trial de novo and his findings of fact under a clearly erroneous standard. *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003). We have examined these findings of fact and, with certain qualifications discussed below, conclude that they are not clearly erroneous.

Our misgivings concern some of the military judge's observations contained in his findings of fact. For example, in commenting on the forensic examination conducted at DCFL, the military judge concluded that the laboratory did not work with what the judge viewed as the

proper speed. He stated, "DCFL should have attached a higher priority to their examination of the materials in [AB Cossio's case]. Had this been done, it is likely that the forensic examination would have been finished much sooner." Later, on another matter, the military judge commented, "[The] initial pre-preferral review took [Headquarters] AFSOC/JA 14 days to turn around. In the Court's view, this took way too long."

Again, in commenting on the substitution of Maj K for Maj A as IO, the military judge stated, "nobody told the defense until 1 December that an investigating officer had been appointed. The Court has trouble understanding why it took nine days to notify the defense of the appointment of [Maj K]." Although Maj K was actually appointed on 29 November 2005, only 3 days prior to notification, the judge apparently believed that these actions should have taken place much sooner. The military judge also found that AB Cossio's case would not involve "an overwhelming amount of case preparation" and implied that a forensic examination of the five hard drives in question may not have even been necessary to prove up the charges.

In examining these statements, and any other similar ones that may be contained in the findings of fact, we note that military judge's concern is the length of time that was involved in preparing the case for trial. Insofar as the statements refer to elapsed days, they can be compared with the testimony and other evidence for accuracy. However, to the extent that they contain criticism of the government's processing of the case, they are problematic. That is, while in a sense it may be true that, compared to a standard of ideal justice, the AFSOC/JA took "way too long" to do its initial review of the case, it is also true that this statement cannot be verified or disproved by anything in the record, although we note the large number of cases that AFSOC was overseeing at the time.

This is also true of the military judge's apparent belief that the case would not involve extensive preparation and that a forensic examination may not even have been needed. These statements are also speculative, made, no doubt, with the advantage of hindsight. Therefore, we take these conclusory statements to be opinions of the military judge to which we give due consideration but which we do not consider to be matters of objective fact which

can be tested for clear error and which must necessarily affect our holding. Turning to the legal [principles] at issue here, Article 10, UCMJ, provides that "When any person subject to [the UCMJ] is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." The standard for measuring compliance with Article 10 "is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)).

Our superior court has determined that, in evaluating an alleged violation of Article 10, we must apply the criteria set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "Length of delay, the reason for the delay, the defendant's assertion of his right [to a speedy trial], and prejudice to the defendant." *See also United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999).

In applying these criteria to AB Cossio's case, we note that the length of time elapsing

between incarceration of AB Cossio and his arraignment—117 calendar days—is not in dispute. The military judge calculated the days attributable to the government as 109 days, making allowances for delays at the behest of the defense. However, for purposes of Article 10, we view the difference between the two to be insignificant. There is no dispute that AB Cossio made a demand for speedy trial. Therefore, we will focus our discussion on the other two criteria, bearing in mind our superior court's holding that Article 10 provides a more "stringent" speedy trial protection than the Sixth Amendment. *Id.*

Reason for the Delay

The military judge concluded that various blocks of time consumed in the processing of the case were excessive and without adequate reason. He mentioned, for example, the 14 days it apparently took the AFSOC/JA to examine the case prior to preferral, the 7 days to appoint Maj K as IO, the fact that Maj K did not set the Article 32, UCMJ, hearing immediately, and that, in the military judge's view, the government should have requested a trial date prior to 30 January 2006, utilizing other military installation courtrooms or conference rooms if necessary.

However, after examining the record as a whole, and drawing upon our own common sense and knowledge of the ways of the world, we conclude that the reason for the timing of the preferral, Article 32, UCMJ, hearing, referral, and arraignment in this case is that there was extensive investigation which had to be undertaken before it could be competently tried. While no doubt most of the data gleaned from examining the five hard drives in question was not relevant to the case, it is only to be expected that the government would want to pursue all possible sources of information before undertaking a prosecution. Despite the military judge's view that the case is not difficult, we see nothing unusual, let alone negligent, in the government exploring all possible leads that come to its attention. To put it succinctly, when an accused is arraigned five days after the completion of the AFOSI report of investigation, our first impression is not that the government has been dilatory.

We acknowledge that there were some apparent missteps in the government's handling of the case. For example, the government did not provide all the requested discovery to the defense as expeditiously as it could have. However, the various periods of time identified

by the military judge as unreasonable delays never rose to the level of an absolute cessation of case preparation, as occurred in *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F. 1996). In that case, the government apparently stopped processing the trial altogether, thereby causing an Article 10 violation. In any event, an accused is entitled to a fair trial, not necessarily a perfect one. *See generally United States v. Hasting*, 461 U.S. 499, 508 (1983).

The military judge recognized the government's interest in thoroughly exploring all aspects of a case prior to trial when, in the last of his factual findings, he stated:

> Although the defense in this case repeatedly asked for an early trial date, if this case had been fully litigated and the DCFL report had not yet been completed, it is likely that the defense theme would be "the government's rush to judgment." Given that the burden of proof is upon the government, and the fact that government counsel's job is to seek justice and not simply a conviction, the government in

> every case has a right to methodically and carefully prepare its case, with due consideration for the requirements of Article 10.

Prejudice

Assuming, arguendo, that nevertheless the government has been dilatory in its processing of the case, we must still inquire as to whether AB Cossio has been prejudiced. The military judge's analysis of this criterion is as follows:

> Although there was pretrial confinement in this case, there has been no evidence that [AB Cossio's] "anxiety and concern" has exceeded the norm. There's been no showing that he wasn't paid, after an early finance glitch that was remedied. There's been no showing that the conditions of his pretrial confinement have been unduly harsh. There's been no showing that his defense has been impaired by the passage of time. Lastly, upon conviction, he would be entitled to receive administrative credit upon any

> sentence to confinement for the days he spent in pretrial confinement. Therefore, there is no prejudice in this case beyond that inherent in sitting in pretrial confinement for 109 days.

Admittedly, confinement is prejudicial. However, balancing the mere fact of pretrial confinement against the government's interest in a thorough investigation of the case, and especially taking into account the military judge's own determination that AB Cossio's ability to put on a defense had not been harmed, we conclude that there has been no prejudice to the substantial rights of AB Cossio. *See United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005).

Decision

Examining the record of trial in light of the *Barker* criteria, and applying the Article 62, UCMJ, standard of review, we hold that AB Cossio has not been denied his right to a speedy trial as secured by Article 10, UCMJ. The decision of the military judge dismissing the charges and specifications is set aside. Accordingly, the appeal of the United States is

GRANTED.

Judge FINCHER participated in this opinion prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator